



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 38 OF 2014

BETWEEN

SAMSON MUMO MUTINDA T/A PATROL DRIVING SCHOOLPETITIONER

AND

INSPECTOR GENERAL,NATIONAL POLICE SERVICE..... 1ST RESPONDENT

DAVID KUBABI.....2ND RESPONDENT

GILBERT OKEMWA.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

JUDGMENT

1. The petitioner, a businessman, has been running a driving school within the Nairobi Central Business District since 2004. He has filed the petition dated 27th January 2014 seeking the following orders;
 - i. *A declaration that the search of the petitioner's business premises/driving school and the seizure and confiscation of his school registers and his mobile phone by the 2nd and 3rd respondents police officers without warrants or any court orders rendering the petitioner unable to carry out his businesses and to earn a livelihood are violations of the petitioner's fundamental rights life, to the protection and benefit of the law, human dignity and privacy guaranteed by Articles 26(1), 27(1), (2) 28 and 31 of the Constitution.*
 - ii. *A declaration that the actions of the 2nd and 3rd respondents police officers in accessing, listening, reading and interfering with petitioner's private mobile telephone communications and making inquiries about the petitioner from his telephone contacts slanted with aspersions and innuendos that the petitioner has committed crimes are violations of the petitioner's fundamental rights to the protection and benefit of the law, human dignity, privacy and protection of his reputation guaranteed by Articles 27(1), (2), 28, 31(c), (d) and 33(3) of the Constitution.*
 - iii. *A declaration that the seizure and confiscation of the petitioner's school registers of students and*

his mobile phone and its sim cards/lines by the 2nd and 3rd respondents police officers without warrants of any orders of a court of law are violations of the petitioner's fundamental right against deprivation of private property of whatever description guaranteed by Article 40(3) of the Constitution.

- iv. A mandatory order/injunction directed against the 1st, 2nd, and 3rd respondents compelling them to return to the petitioner his school registers of students and his mobile phone and its 2 sim cards/line confiscated by the 2nd and 3rd respondents police officers as appearing in annexure "SMM5" of the petitioner's supporting affidavit herein.
- v. An order for general, exemplary/vindictory and/or punitive damages against the respondents consequential to declarations of violations of the fundamental rights and freedoms of the petitioner in prayers (i) to (iii) above.
- vi. Costs of the petition.
- vii. Interest on all monetary awards.

Petitioner's Case

2. The petitioner's claim, as set out in the petition and supporting affidavit, is that on 14th January 2014, the 2nd and 3rd respondents, who are police officers, without any warrants or orders issued by a court of law, visited the driving school, searched the premises, seized, confiscated and took away his register of students for the years 2012, 2013 and 2014. The officers did not allow him to make copies of the registers. They also took away his dual sim mobile phone. The items have not been returned to date.
3. The petitioner denies that he has committed any crime. According to the inventory prepared by the police, the matter concerns, " ... investigations KRA case of fraudulent issuance of valid driving licences to unqualified persons." The petitioner states that this allegation is of a general nature and that no officer from the Kenya Revenue Authority ("KRA") Investigations and Enforcement Unit who has visited the school, called or summoned him in connection with any allegation concerning KRA which is involved in the licensing of drivers.
4. The petitioner claims that as result of the unlawful seizure and confiscation of his school registers, he has been forced to temporarily close down the school. The closure has inconvenienced registered students and has deprived him of means of livelihood as the school is his only business. He also complains as a consequence of the unlawful seizure of his mobile phone, he is unable to optimally attend to his daily chores and transact business.
5. The petitioner accuses the police of accessing, listening, reading and interfering with his private communication and making inquiries about him from his telephone contacts to third parties slanted with aspersions and innuendos that he has committed crimes which has caused him distress.
6. The petitioner case is that his fundamental rights to dignity and privacy protected under **Articles 28** and **31** of the Constitution respectively, have been violated. Counsel for the petitioner, Mr Mureithi, submits that the continued detention of the register and the mobile phone is not justifiable within the parameters of **Article 24**. Counsel submitted that the evidence of the investigating officer shows that there is no timeline for return of seized items unless compelled by the court.

Respondent's Case

7. The respondents oppose the petition based on replying affidavit of David Kubabi, a police officer, who is the investigation officer. He also gave oral testimony and was cross-examined by the petitioner's counsel.
8. He states that on 2nd August 2013 his team was instructed to commence investigations into allegations of fraudulent issuance of driving licences and PSV/TLB stickers by both driving test

examiners and motor vehicle inspectors respectively, whereby an applicant would secure a valid driving licence without undergoing initial driving course and appearing in person for practical and theory tests by police driving examiners.

9. He further depones that he commenced investigations and two female police officers who have no experience in driving were used as conduits in order to unearth the racket involved in issuing of driving licenses fraudulently. The "applicants" provided two passport photos, a copy of their national identity cards and physical addresses, interim driving licence and fee for processing of the driving licence. The two police officers acquired the two driving licences for class BCE after submitting the above requirements without having undergone any driving test. The driving licences were forwarded through a post office address which was found to be registered under the name of the petitioner.
10. Corporal Kubabi deponed that the evidence pointed to an elaborate racket in the issuance of fraudulent driving licences carried out with KRA officers. As a result the petitioner was summoned to CID headquarters to record his statement. He complied with the summons, but declined to record any statement stating that he would only record a statement if accompanied by his lawyer who did not show up. However, the petitioner and Coporal Kubabi proceeded to the driving school premises where the police took several items including booking registers for the year 2012 and 2013, a mobile phone used by the school and Sim cards. The petitioner signed the Inventory certificate.
11. According to Cpl Kubabi the preliminary investigation from the Cybercrime unit indicates that the mobile phone was used in conveying information related to the two driving licences under ? investigation, including the names of the applicants and the Driving licence Numbers. The said mobile phone was submitted to the Cyber Crime Unit to conduct further investigations.
12. The respondents' case is that it is intended that after investigations are complete, criminal charges may be instituted against any person found to be culpable. The said register of students and the mobile phone are retained to be used as an exhibit.
13. Mr Njogu, counsel for the 1st, 2nd, 3rd and 5th respondents, argued that the Police have constitutional and statutory mandate to investigate crime. Counsel referred to **sections 57 and 60** of the **National Police Service Act** which empower the police to enter premises and to search the premises without warrant. He submitted that the due process was followed in this case and that there was no violation of the petitioner's fundamental rights. As regards the release of the petitioner's items he contended that the investigation was still ongoing and an order of release would prejudice the investigation and trial if the Director of Public Prosecutions made a decision to charge the petitioner.
14. The Attorney General represented by Mr Sekwe, supported the position of the Director of Public Prosecutions. He urged the court to have regard to the nature of the offence alleged and investigation which are complex and require time to conclude.

Determination

15. The core issue for determination in this case is whether the search and seizure of the petitioner's registers from his business premises in the circumstances of this case violated the petitioner's right to privacy.
16. The right to privacy is secured by **Article 31** of the Constitution which states as follows;

31. *Every person has the right to privacy, which includes the right not to have—*
(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

17. In **Samura Engineering Limited and Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011** the court emphasised the importance of the right to privacy, “[66] *The right to privacy enshrined in our Constitution includes the right to not to have one’s person or home searched, one’s property searched or possessions seized. Since searches infringe the right to privacy, they must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state. (See Mistry v Interim National Medical and Dental Council & Others CCT 13/1997 [1998] ZACC 10 at para. 25 per Sachs J.)*”

18. It is not in dispute that the National Police Service has a Constitutional and statutory mandate to detect and investigate crime. In the course of investigations, the Police are entitled to search premises and seize property without warrants in certain circumstances under authority of the **National Police Service Act (Chapter 84 of the Laws of Kenya)**. The procedure for obtaining warrants is provided for under the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

19. The pertinent parts of the **National Police Service Act (Chapter 84 of the Laws of Kenya)** provide as follows;

57. *Subject to the Constitution, if a police officer has reasonable cause to believe—*

(a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

60.(1) *When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code (Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.*

(2) *Sections 119, 120 and 121 of the Criminal Procedure Code (Cap. 75) as to the execution of search warrant, and the provisions of that Code as to searches shall apply to a search without a warrant under this section.*

20. This case is not about the constitutionality of the aforesaid provisions. The petitioner's complaint is that the carrying out of a search and seizure not authorised by the court amounts to a violation of the petitioner's rights. The respondents admit that a warrant of search and seizure was not obtained in accordance with the provisions of the **National Police Service Act** which I have cited above. Whether there has been a violation then of the Constitution calls for an examination of the circumstances under which the search and seizure was done.

21. The circumstances under which the search and seizure was conducted are clearly set out in the petitioner's deposition as follows;

[5] On Tuesday 14th January 2014 I received a telephone call from the 2nd respondent police officer DAVID KUBAI asking me to go and see him at CID Headquarters, Mazingira House ..

*[6] I promptly went to the officer of the 2nd respondent where I found the 3rd respondent Gilbert Okemwa ... who showed to me 2 Certificates of Competency to drive motor vehicles bearing my postal address ******

[7] The said officer informed me that they needed to search my school registers of students and other documents since they were interested in knowing how the 2 bearers of the Certificates of Competence obtained the certificates.

[8] Together with the said officers, using my motor vehicle we drove to my school where the officers searched my office and obtained registers of students from 2012 to date, cross checked the same and the names of the bearers of the said certificates were missing.

[9] Despite what is averred to in paragraph 8 above the said officers proceeded to seize and confiscate my school registers

[11] After the said officers confiscated my school registers I drove them in my said motor vehicle back to Mazingira House where upon arrival at the gate as I was dropping them off they asked me for my personal mobile phone The officers then overwrote the mobile phone in the inventory earlier done at the school as part of the seized and confiscated items.

22. The facts as outlined above point to the fact that the search and seizure was done with the petitioner's own consent. Although he decline to be interrogated by the police officers unless his lawyer was present he voluntarily took the police to his premises. From the time he went with the policemen to his premises and permitted them to search his office and take away the register and subsequently his phone he knew that he was in the company of policemen and he knew that they were carrying out investigations. He was also informed of the nature of the investigations being carried out and had the opportunity to object to the search just as he done with the interrogation.

23. The right to privacy protects a person's autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under **Article 24** or failure to obtain consent of the person. Thus the right to privacy may be waived by a person consenting to the search of his person or premises in certain circumstances. Such consent must be voluntarily and freely given.

24. In this case the police officers cannot be faulted for acting in the manner they did as the petitioner permitted them entry into his premises and voluntarily gave them the items they sought. I therefore find and hold that the petitioner freely gave his consent to the search and seizure and that he cannot therefore complain that there was a violation of his right to privacy.

25. As to whether withholding the petitioners phone and register is unreasonable, I find that the

respondents have shown sufficient and reasonable evidence that there is an investigation going on that may require some time to complete. I am aware that this court is not the trial court to conduct a mini-trial of all the evidence available as to do so would prejudice further investigations and a future trial. All I am required to find is that there is a reasonable basis for the actions taken by the police. In light of the facts narrated by the 2nd respondent and the material before me there is reasonable basis to conduct the investigations and release of the seized items at this stage would not be in the interest of justice as they may be required as exhibits for the court process or required for further investigation.

Determination

26. I therefore find that the petitioner has not established violation of his rights. Consequently the petition is dismissed. I however direct that the petitioner be furnished with copies of the attendance registers to enable continue his business.

27. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 17th February 2014

D.S. MAJANJA

JUDGE

Mr Mureithi instructed by Mbugua Mureithi and Company Advocates for the petitioner.

Mr Njogu, Litigation Counsel, instructed by the Director of Public Prosecutions for the 1st, 2nd, 3rd and 5th respondents.

Mr Sekwe, Litigation Counsel, instructed by the State Law Office for the 4th respondent.